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No. 846

In the

Supreme Court of the United States

October Term, 1961

MELVIN SCHAENGOLD,
Appellant

vs.

THE CITY OF CINCINNATI, OHIO,
Appellee

On Appeal From The Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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In accordance with the provisions of Rule 13 (1) of The Rules of this Honorable Court, Mr. Chief Justice Carl V. Weygandt of the Supreme Court of Ohio, Chief Justice of the Court whose decision is being appealed to this Court, extended the time for filing the record in this cause in this Court until April 3, 1961.

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SUPREME COURT OF THE UNITED STATES

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No. ———

MELVIN SCHAENGOLD,
Appellant,

vs.

THE CITY OF CINCINNATI, OHIO,
Appellee.

On Appeal From The Supreme Court of Ohio

JURISDICTIONAL STATEMENT

Appellant appeals from a final judgment of the Supreme Court of Ohio entered on October 26, 1960, denying to appellant a Rehearing of its judgments entered on October 5, 1960, dismissing appellant's Appeals as of Right in that Court and overruling appellant's Motion to Order the Court of Appeals of Hamilton County, Ohio, to certify its record to the Supreme Court of Ohio.

Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Ohio on December 13, 1960.

On January 24, 1961, acting in accordance with the provisions of Rule 13 (1) of the Rules of the Supreme

Court of the United States, Mr. Chief Justice Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, the Court whose judgment is now being appealed to this Court, extended the time for filing the record in this Court until April 3, 1961. This is set forth in Appendix "C".

OPINIONS BELOW

The Municipal Court of Cincinnati, Ohio, Traffic Court Division, the Court before which this cause was tried wrote no opinion; the Court of Appeals of Hamilton County, Ohio, to which an appeal was taken from the judgment of the Municipal Court of Cincinnati, Ohio, wrote an opinion — a majority opinion affirming the judgment of the Municipal Court of Cincinnati, Ohio, and a dissenting opinion which would have reversed the judgment of the Municipal Court of Cincinnati, Ohio on federal constitutional grounds. The Supreme Court of Ohio wrote no opinion at all.

Both the majority and the minority opinions of The Court of Appeals of Hamilton County, Ohio, are made a part of this Jurisdictional Statement by being printed as Appendix "A".

JURISDICTION

Appellant was convicted of the crime of No Stopping and No Parking in violation of Section 508-2 of the Code of Ordinances of the City of Cincinnati, Ohio, and was sentenced to pay the costs of the prosecution. He is currently at liberty on his own recognizance pending the outcome of this appeal.

Appellant was tried before a Judge of The Municipal Court of Cincinnati, Ohio, sitting without a jury, Traffic Court Division.

At the trial appellant unsuccessfully challenged the constitutionality of Section 508-2 of the Code of Ordinances of the City of Cincinnati, Ohio, on Federal Constitutional grounds, and re-newed and pursued that same attack through every state Appellate Court that has preceeded this Honorable Court in the hearing of this cause.

This appeal is taken, and the jurisdiction of this Honorable Court is invoked, pursuant to 28 USC 1257 (2); *King Mfg. Co.* v. *City Council of Augusta,* 277 US 100; *Jamison* v. *Texas,* 318 US 413, 414; *Independent Warehouses* v. *Scheele,* 331 US 70, 79; *Poulos* v. *New Hampshire,* 345 US 395, 402, since there is drawn in question the validity of a state statute (a city ordinance being the equivalent of a state statute for this purpose in accordance with the rule of the cases cited above), and the decision below was in favor of its validity.

STATUTES INVOLVED

Section 508-2 of the Code of Ordinances of the City of Cincinnati, Ohio, which is printed in Appendix "B".

QUESTION PRESENTED

Is Section 508-2 of the Code of Ordinances of the City of Cincinnati, Ohio, unconstitutional on federal grounds because it violates the rules of separation of powers and of the prohibition against the delegation of powers by one branch of the government to another as well as being in conflict with US Constitution, Article IV, Section IV?

STATEMENT

Appellant is an Attorney (and a Member of the Bar of this Honorable Court) practicing his profession in the City of Cincinnati, Ohio.

On August 15, 1957, appellant parked his automobile in the City of Cincinnati, Ohio, and when he came back for his car there was a tag on it which read: "No Parking – violation of Section 508-2, Code of Ordinances." Believing that Section 508-2 was then, and still is now, unconstitutional from a federal standpoint because it delegates law making powers to one man and makes him a dictator, appellant threw the tag away, and sat back to see what would happen.

Subsequent thereto, a warrant was issued for appellant's arrest and, on April 17, 1959, appellant was tried before the Honorable Gilbert Bettman, one of the Judges of the Municipal Court of Cincinnati, Ohio, on the charge of violating Section 508-2 of the Code of Ordinances of the City of Cincinnati. (Trial could have been avoided had appellant elected to pay the tag, but believing that Section 508-2 of the Code of Ordinances of the City of Cincinnati, Ohio was, and still is, unconstitutional from a federal standpoint, appellant treated the tag as a "scrap of paper" and threw it away.)

At the trial, appellant filed a Motion in writing to quash the affidavit filed against him alleging that Section 508-2 of the Code of Ordinances of the City of Cincinnati was unconstitutional on federal grounds. The Cincinnati Municipal Court denied that contention; upheld the validity of Section 508-2 of the Code of Ordinances of the City of Cincinnati; convicted appellant; sentenced him to pay the costs of the prosecution; and then released appellant on his own recognizance and stayed the execution of his sentence and judgment so that appellant could take an appeal to the Court of Appeals for Hamilton County, Ohio.

Within the time provided by Ohio law, the appellant perfected his appeal from the judgment of the Municipal Court of Cincinnati, Ohio, to the Court of Appeals for Hamilton County, Ohio.

In the Court of Appeals for Hamilton County, Ohio, appellant again challenged the constitutionality of Section 508-2 of the Code of Ordinances of the City of Cincinnati, Ohio, on federal constitutional grounds.

The Court of Appeals of Hamilton County, Ohio, is composed of Three Judges who sit in banc and who hear all appeals brought before them as a Matter of Right and on their merits.

By a vote of 2-1, the Court of Appeals of Hamilton County, Ohio, affirmed appellant's conviction, and sustained the federal constitutionality of Section 508-2 of the Code of Ordinances of the City of Cincinnati. The dissenting member of the Court of Appeals of Hamilton County, Ohio, Judge James E. O'Connell, wrote an extensive, scholarly, well-reasoned, and lucid opinion in which he agreed with the appellant that Section 508-2 of the Code of Ordinances of the City of Cincinnati, Ohio, is repugnant to and void under the Constitution of the United States. Appendix "A".

Appellant then proceeded (after the Court of Appeals of Hamilton County, Ohio continued his stay of execution in full force and effect) to perfect an appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals of Hamilton County, Ohio affirming appellant's conviction in the Municipal Court of Cincinnati, Ohio.

The Supreme Court of Ohio has an Appellate Jurisdiction similar and akin to the Certiorari Jurisdiction of this Honorable Court. See: *Williamson* v. *Rubich*, 171 OS 253, 254, where the Supreme Court of Ohio makes that comment about its own Appellate Jurisdiction. An appellant coming on appeal to the Supreme Court of Ohio from the Court of Appeals can also Appeal as of Right if he feels that his case involves a debatable constitutional question under the Constitution of the State of Ohio,

or the Constitution of the United States, or both. *Williamson* v. *Rubich*, 171 OS 253.

With that in mind, and to preserve the Federal Constitutional Question, which appellant had all ready raised in both the Municipal Court of Cincinnati, Ohio, – the Trial Court – and the Court of Appeals for Hamilton County, Ohio, and which question had been ruled upon adversely to appellant by both of those Courts – appellant appealed to the Supreme Court of Ohio from the Court of Appeals of Hamilton County, Ohio, in two ways:

1.) He Appealed as of Right alleging the same federal constitutional questions that he had raised in both the Municipal Court of Cincinnati, Ohio, and the Court of Appeals of Hamilton County, Ohio.

2.) He filed in the Supreme Court of Ohio A Motion for Leave to Appeal to It (A Motion for Leave to Appeal, under Ohio Practice is the same thing as a Motion to Certify the Record) from the Court of Appeals for Hamilton County, Ohio, thereby invoking the discretion of the Supreme Court of Ohio as to whether or not that Court would hear the appeal on its merits. *Williamson* v. *Rubich*, 171 OS 253.

The Supreme Court of Ohio, without Opinion, and with six of its seven members concurring, dismissed the Appeal as of Right and overruled the Motion for Leave to Appeal, thereby, under Ohio practice, never reaching the merits of the case. *Williamson* v. *Rubich*, 171 OS 253.

An Application for Re-Hearing was then timely filed in which the same federal constitutional questions were raised that had been raised at every stage of the proceedings both at the trial of this cause and on appeal, together with a request that the Supreme Court of Ohio, in the event that it deny Rehearing indicate that its action rested upon an adequate non-federal ground, citing *Murdock* v.

Memphis, 20 Wall 590, 636, *Eustis v. Bolles*, 150 US 361, 370, as authority for such a request. The Application for Re-Hearing was considered by the Supreme Court of Ohio and denied, without opinion and without indicating that its action rested on an adequate non-federal ground.

The final judgment of the Supreme Court of Ohio denying rehearing was entered in that Court on October 26, 1961, and it is from that judgment that appellant appeals.

THE QUESTION IS SUBSTANTIAL

This is an appeal under 28 USC Sec. 1257 (2) from a final judgment of the highest court of Ohio where is drawn in question the validity of an Ohio ordinance on the ground of its repugnance to the due process clause (Fourteenth Amendment) and to Article IV, Section 4 (the United States Government guarantees to each State a Republican form of Government) of the Constitution of the United States, the decision below being in favor of its validity. The Federal Constitutional question was timely raised in the Court of First Instance, The Municipal Court of Cincinnati, which upheld the validity of the Ohio ordinance as applied to appellant. This ruling was necessary to the decision, there being no independent state ground upon which the decision rested. The same constitutional question was raised on appeal to both the Court of Appeals of Hamilton County, Ohio, and to the Supreme Court of Ohio, both Courts ruling on it in the same manner and both Courts resting their decision on the ruling of the lower Court — The Municipal Court of Cincinnati, Ohio.

It is beyond dispute that this Court's appellate jurisdiction is properly invoked under 28 USC 1257 (2) where, as here, the objection is that the state statute or ordinance is unconstitutional as applied to the person challenging the statute or ordinance. *Dahnke-Walker Milling Co.*

v. *Bondurant*, 257 US 282 (1921); *Eureka Pipe Line Co.* v. *Hallanan*, 257 US 265 (1921); *Fiske* v. *Kansas*, 274 US 380 (1927); *James Stewart & Co.* v. *Sadrulaka*, 309 US 94 (1940); *Standard Oil Co.* v. *Johnson*, 316 US 481 (1942); *King Mfg. Co.* v. *City Council of Augusta*, 277 US 100; *Jamison* v. *Texas*, 318 US 413, 414; *Independent Warehouses* v. *Scheele*, 331 US 70, 79; *Poulos* v. *New Hampshire*, 345 US 395, 402.

The constitutional question presented is a substantial one and is of major importance to every person in the United States who drives and who parks any kind of a motor vehicle of any nature whatsoever.* The ruling of the Ohio courts on this question is clearly erroneous being in direct conflict with several long standing decisions of this Court holding that a legislative body cannot delegate legislative powers to an administrative officer. *Hannegan* v. *Esquire*, 327 US 146, 156; *U. S.* v. *Rumley*, 345 US 41, 46; *Schechter* v. *U.S.* 295 US 495; *Panama Refining Co.* v. *Ryan*, 293 US 389; *Yick Woo* v. *Hopkins*, 118 US 356. We have no way of knowing why the Ohio courts did not follow these decisions since no opinion was written by the Ohio Courts to sustain their action in this case.

A reading of Section 508-2 of the Code of Ordinances of the City of Cincinnati shows that the City Council of the City of Cincinnati, by legislative fiat, gave to the City Manager of the City of Cincinnati (Cincinnati has a City Manager form of government) carte blanche power to say where one may or may not park an automobile or any motor vehicle in the territorial limits of the City of Cincinnati, Ohio. A criminal penalty is imposed for the violation of any order made by the City Manager in pur-

*Neither the appellant nor Judge O'Connell, in his dissenting opinion, question the right of a municipality to control its streets to put reasonable regulations on the use of automobiles on the public thoroughfares. However, such regulations must respect the constitutional limitations, one of which provides for the separation of powers.

suance of Section 508-2 of the Code of Ordinances of the City of Cincinnati. Nor does the ordinance set up any standards to guide the City Manager in his determination as to where parking a motor vehicle is or is not permissible. He acts as he sees fit.

As Judge O'Connell points out in his dissenting opinion that is the vice of the ordinance. The City Manager is given dictatorial power over a way of life that is essential to the pursuit of liberty and of happiness, namely, freedom of locomotion. And this Court has gone on record as saying that it will construe narrowly, and invalidate, if necessary, all delegated powers that affect the right of an American citizen to travel. *Kent* v. *Dulles*, 337 US 116. That is why the appellant challenged the ordinance in the first place; that is why Judge O'Connell in his dissenting opinion would have struck down the ordinance; and that is why the federal question in this case is substantial. The right to travel any place in the world — including around one's home town — is a fundamental right of American citizenship. *Kent* v. *Dulles*, 337 US 116. By the enactment of Section 508-2 as a part of its Code of Ordinances the appellee not only substantially interferred with this right of travel but also set up a dictatorship that has a life and death power over that right. He who can control where you can or cannot park your car, in this day and age of transportation by automobile, also controls, restricts, expands, enlarges, or denies, at his whim, your freedom of travel, thereby bringing into force the provisions of Article IV, Section IV of the Constitution of the United States — the part of the Constitution which guarantees to each State (a city is a part of a state and therefore within the Constitution shield) a republican form of government. And since a consideration of the record as a whole clearly shows an intent to raise a constitutional

question this Court can consider the impact of Article IV, Section IV of the Constitution of the United States of Section 508-2 of the Code of Ordinances of the City of Cincinnati. *New York ex rel Bryant* v. *Zimmerman*, 278 US 63, 67. That a dictatorship cannot exist within a Republic without destroying the Republic is too obvious a point to belabour — Res Ipsa Loquitor — it speaks for itself.

There are very few decisions from state courts construing an ordinance such as this possibly because few, if any, state legislative bodies would have the temerity to pass such an ordinance. For decisions of state courts holding that statutes and ordinances such as the one involved in this case are unconstitutional as being in violation of both the Federal Constitution and the Constitution of their particular state, the attention of the Court is respectfully directed to the following:

Florida: *Drexel* v. *Miami Beach*, 64 So. (2nd) 317.

Louisiana: *City of Shreveport* v. *Herndon*, 159 LA 113.

Virginia: *Thompson* v. *Smith*, 71 LRA 604, 155 VA 367.

Consequently, whether or not the decision below should ultimately be upheld, the question here is substantial and merits review. Since that decision runs counter to a constitutional doctrine which has been accepted for many years and which should be re-affirmed, the necessity for noting jurisdiction here is even stronger. Indeed, if summary action is justified at all in this case, it would be on the side of a summary reversal on the basis of decisions of this Court which are squarely in point.

The most objectionable feature to the Cincinnati Ordinance is that it gives dictatorial power to one man, and makes the violation of that man's determination a crime. If a legislative body can constitutionally delegate to one man the power to make the doing of an act a crime, as

is the case here in the field of parking a motor vehicle, where do we stop? What, then, is there to prevent the same legislative body from delegating to the same man, or to any other man of its fancy, the power to make all of the criminal laws of the community? And if that is constitutional, what is the meaning of Article IV, Section IV of the Federal Constitution and its guarantee to each state from the Federal Government a Republican form of Government? Only this Court can answer those questions and that is why probable jurisdiction should be noted.

CONCLUSION

This country was formed as a protest against tyranny. It was Madison who said: "No political truth is of greater intrinsic value. The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, or few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny". And Jefferson said: "An elective despotism is not what we fought for, – but one in which the powers of government should be so divided and balanced – that no one could transcend the legal limits without being effectively checked and restrained by the others". (taken from the dissenting opinion of Judge James E. O'Connell, Apendix "A"). And in the case of *Kilbourne* v. *Thompson*, 103 US 188, this Court itself has said: "It is believed to be one of the chief merits of the American system of written constitutional law that all powers intrusted to the government, whether state or national, are divided into three grand departments – the executive, the legislative, and the judicial: that the function appropriate to each of these branches of government shall be vested in a separate body of public servants and that the perfection of the system requires that the lines which

separate and divide these departments shall be broadly and clearly defined".

Since the beginning of our country as a Nation this principle has been relied upon by all citizens in all walks of life as a guarantee of a way of life upon which they could rely. This principle has been accepted by every state in the Union except Ohio. If the American people, as well as the people throughout the world, are now told that this principle is no longer a principle of American law, the result would be a death blow to liberty and to individual freedom, throughout the world.

THE JUDGMENT BELOW BEING CLEARLY ERRONEOUS, AND THE CONSTITUTIONAL ISSUE SUBSTANTIAL, PROBABLE JURISDICTION SHOULD BE NOTED, AND THE JUDGMENT REVERSED.

All of which is respectfully submitted by,

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APPENDIX "A"

(CAPTION OMITTED)

OPINION OF THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

(Entered April 11, 1960.)

BY THE COURT:

An examination of the record discloses no error, prejudicial to appellant. The judgment of the Municipal Court of Cincinnati is, therefore, affirmed.

MATTHEWS, P. J., & LONG, J., CONCUR.

O'CONNELL, J., dissents in separate opinion.

O'CONNELL, J., dissenting.

The defendant herein was convicted of improper parking and stopping under Section 508-2 of the Code of Ordinances of the City of Cincinnati, on August 13, 1957 and on April 2, 1957, in cases Nos. T81095 and T81096 (City of Cincinnati v. Melvin Schaengold). This ordinance is as follows:

"The city manager is hereby authorized and required to ascertain on what highways and parts of highways and all other municipal property the accommodation of traffic for the safety of the public requires the restriction as to time, or the prohibition of the parking or stopping of vehicles, and he shall erect and maintain appropriate traffic signs plainly indicating the purport of such restrictions. It shall be unlawful to park or stop a vehicle in violation of a traffic sign so erected."

This ordinance gives to the city manager the authority to erect and maintain signs with reference to restrictions on parking and stopping.

Parking is defined in 501-pl, as follows:

"The standing of a vehicle or trackless trolley, whether

occupied or unoccupied within a highway. The term shall not apply to the temporary stopping of a vehicle or a trackless trolley for the purpose of and while actually engaged in loading or unloading passengers, or of a truck for the purpose of and while actually engaged in loading or unloading merchandise."

Stopping is defined in 501-57 as follows:

"The stopping or standing of a vehicle or trackless trolley, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic control device."

It would seem that since these two sections refer to different crimes, and that both the affidavits and the warrants are described in the alternative, the warrants are defective for want of certainty, and that the defendant should have been dismissed for this reason.

It may be argued that the words "No Standing 7-9 4-6; P. M. clarifies the matter in the one case. However, the language is still vague. Some statement to the effect that his car was standing at —— o'clock, in an area in which such standing was prohibited during the hours between 7-9 A. M., and 4 to 6 P. M. would have sufficed.

Similarly, in the other case, the particularization of the offense of "stopping *or* parking" is referred to as follows: "No Parking other times." Such language does not apprise the defendant of the crime with which he has been charged. Some language to the effect that he had parked at ——. o'clock, in violation of the sign which read "Parking permitted between —— o'clock and —— o'clock. No parking at other times," would have sufficed.

However there is a much more basic problem involved in this matter — the authority of the city council to delegate law making or rule making powers to the executive branch of the government. In our entire scheme of government, we have clung quite generally to the system

of the division of powers. This practice is predicated upon reason and experience. The purpose, of course, is to protect society in its freedom from the quite universal desire to enslave. Thus Thomas Hobbs said: "I put for a general inclination of all mankind, a perpetual and restless desire of power after power that ceaseth only in death."

This general idea of the separation of powers (so that no one person or no one group should be the dispository of all or an undue portion of the power) was not original with the founders of our Republic. It was suggested by Aristotle, Polybius, and later on by Harrington, Blackstone, John Locke, and especially by Montesquieu in "The Spirit of the Laws" (2 vols. 1748). Of Montesquieu "Madison wrote in the Federalist that he did not originate the doctrine (separation of powers) but had the merit at least of displaying and recommending it to the attention of mankind." (Amer. Fed. Gov't by Herman Clarence Nixon 1952). However, according to Claudius O. Johnson (in his "Gov't in the United States" Fourth Edition, 1947, at page 33, "In the brilliant article in the Federalist (XLVII) Madison demonstrated that the celebrated Montesquieu meant only that there could be no liberty if the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department." This is what Montesquieu had to say on the subject: "When in the same person or in the same legislative body, the law making power is combined with the administrative power, there is no liberty, because there is room for fear the same monarch or the same Senate make tyrannical laws for the purpose of executing them tyrannically . . ."

Montesquieu in the same work also says: "In every government there are three sorts of power: the legislative, the executive, . . . and the judiciary power . . . When the legislative and executive powers are united in the same

person, or in the same body of magistrates, there can be no liberty . . ."

Blackstone has this to say in the matter in his "Commentaries": "In all tyrannical governments, . . . the right of making and of enforcing the laws is vested in one and the same man, or are in the same body of men; and wherever these two powers are united together there can be no public liberty . . ."

In Aristotle's "Politics" there is this comment on the separation of powers: "All states have three elements, . . . first, that which deliberates about public affairs; second, that which is concerned with the magistrates, and determines what they should be, over whom they should exercise authority, and what should be the mode of electing them, and thirdly, that which has judicial power."

Madison's thoughts in the matter are reflected in these words of his: "No political truth, is of greater intrinsic value. The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, or few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Furthermore, on Thursday, July 19, 1787, addressing the Constitutional Convention in Philadelphia (from Madison's Notes, Vol. V., a Supplement to Elliot's Debates) had this to say on the "separation of power": "If it be a fundamental principle of free government, that the legislative, executive and judiciary powers should be separately exercised, it is equally so that they be *independently* exercised. There is the same and perhaps greater reason why the executive should be independent of the legislature, than why the judiciary should. *A coalition of the two former powers would be more immediately and certainly dangerous to public liberty.*"

And Jefferson said that: "An elective despotism is not what we fought for, . . . but one in which the powers

of government should be so divided and balanced, . . . that no one could transcend the legal limits without being effectively checked and restrained by the others."

Listen to James Bryce (The American Commonwealth, Vol. 1) at p. 26, in these words: "No general principle of politics laid such hold on the constitution-makers and statesmen of America as the dogma that the separation of these three functions is essential to freedom."

Similarly, Professor Raymond Garfield Gettel in his "Political Science" 1933, at page 205, refers to Polybius and Cicero, who "writing of the Roman Republic, attributed its excellence to the system of checks and balances in its organization."

And this is the way that the doctrine was stated by the Supreme Court of the United States in *Kilbourne* v. *Thompson*, 103 U. S. 188: "It is believed to be one of the chief merits of the American system of written constitutional law that all powers intrusted to the government, whether state or national, are divided into three grand departments — the executive, the legislative, and the judicial; that the function appropriate to each of these branches of government shall be vested in a separate body of public servants and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."

Though there was no provision for the separation of powers in the Articles of Confederation, some of the original States spelled out this matter in so many words. Thus the Massachusetts Constitution of 1780 states that: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them, to the end it may be a

government of laws and not of men." Likewise, in the Virginia Constitution of 1776, the doctrine of the separation of powers was set out expressly.

Now there is no explicit provision in the United States Constitution or the Constitution of the State of Ohio for a separation of powers. However, by implication there is provision for such separation. For the United States Constitution begins, Art. I as follows: "All legislative powers herein granted shall be vested in a Congress of the United States"; begins Art. II as follows: "The executive power shall be vested in a President of the United States of America"; begins Art. III as follows: "The judicial power of the United States shall be vested in one Supreme Court and such other inferior courts as Congress shall from time to time establish".

And the Ohio Constitution of 1851 in Art. II provides that: "The legislative power of the State shall be vested in a general assembly . . ."; in Art. III it provides that "the executive department shall consist of a governor, lieutenant governor, secretary of state, treasurer of state and attorney general", and in Art. IV it provides that "the judicial power of the State is vested in a Supreme Court, Court of Appeals, Courts of Common Pleas, Courts of Probate, and such other courts inferior to the Courts of Appeals as may from time to time be established by law".

Now it is true that there is an overlapping of these powers: the Senate exercises executive powers when it ratifies treaties or appointments, it sits as a court after the House of Representatives has exercised its power to impeach; and the President exercises legislative powers when he exercises his veto powers. For the most part, however, the separation is complete.

What is meant by the law making power, the executive power and the judicial power? Or better still, what is a

law". The word itself is of Danish origin (as are so many words in our language as a result of the several invasions of England by the Danes between 800 and 1000 A. D.).

The eminent Spanish Jesuit scholar Francisco Suarez (1548-1617) often referred to as "the last of the schoolmen", theologian, scholastic, philosopher and political scientist, co-founder of the Science of International Law, began his famous treatise on government (De Legibus ac Deo Legislatore) with an explanation of the term *law* as follows: "Law is a certain measure of moral acts in the sense that such acts are characterized by moral rectitude through their conformity to law and by perversity if they are out of harmony with law."

The law making power therefore is that person or group to which the power of making such measures is entrusted; the executive power is that person or group to which the power of enforcing such rules has been given; the judicial power is that person or group to which has been entrusted the duty of interpreting and applying such rules.

In England, whose government is both initary and parliamentary, and, no doubt, under other similar systems of government the legitimacy of the transfer of the so-called rule making power is generally recognized, though there is a general distrust of the rule making power in this country, under the federal government there has been a widespread disregard for the constitutional provisions for the separation of powers. Of course, the stock defense in the matter is that there is no delegation of law making powers, but rather a mere delegation of the power to supply the details of legislation already enacted by Congress. It is not difficult to understand the subterfuge.

This disregard for the constitutional provisions has gone on in the face of federal decisions holding such delegations of power unconstitutional. For instance in Schecter v. U. S. 295 U. S. 495, Chief Justice Hughes had this to say

on the subject: The National Industrial Recovery Act "supplies no standards for any trade, industry or activity . . . Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. In view of the . . . nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade or industry throughout the country is virtually unfettered. We think the code making authority thus conferred is an unconstitutional delegation of legislative power."

Similarly, in Panama Oil Refining Co. v. Ryan, 293 U. S. 389, the seventh paragraph of the syllabus makes clear the position of the court as follows: "The principle forbidding Congress to abdicate or to transfer to others, the essential legislative functions, with which it is vested by Art. I, Section 1, and Art. I, Section 8, paragraph 18 of the Constitution has been recognized by the court in every case in which the question has been raised." And there has been criticism of the invasion of the powers of Congress by the Supreme Court. So U. S. Senator William E. Jenner (Ind.) on behalf of his bill to deny appellate jurisdiction to the Supreme Court in cases dealing with the internal security of the Nation, on March 13, 1958, said: "The Supreme Court is making law. It is making political decisions and embodying them in rules of general applicability. It has no right to do this either. *The Constitution gives the legislative power to Congress.*" (Emphasis ours)

In the matter of the doctrine of Separation as applied to cities, William Burnett Munro, Ph. D. L. L. B., Professor of Municipal Government at Harvard University in his "The Government of American Cities, 1920" has this to say: "The principle of separation of powers, as applied to local government has come to mean that the city executive shall have most of the real authority and that, under the name of legislative jurisdiction, the council may have

whatever is left. The whole trend has been in reducing the council to a body which makes minor ordinances, passes the appropriations with no power to increase them in amount, authorizes borrowing when necessary and does little more."

There is no doubt about the right of the city to control the streets and therefore to put reasonable regulations on the use of automobiles on the public thoroughfares. However, such regulations must respect the constitutional limitations, one of which provides for the separation of powers.

It is of no concern, either, that in the present case, some inconvenience might result; that the council does not have the time or the personnel to give to erecting traffic signs. And the fact that (whether it is true or not is a question) the city manager with his numerous subordinates is much better equipped to undertake the task of providing the proper locations for traffic signs and the proper restrictions on parking has no bearing in the matter. The well known cliche that "the end does not justify the means" certainly applies here.

So it appears in 6 Ohio Jur. (2d) 122, at p. 317, that: "The authority to enact local regulations may not be delegated by the municipality to any subordinate department in its government."

Likewise, in the City of Cincinnati v. Cook, 107 O. S. 223, the ordinance relating to parking was held unconstitutional as an unlawful delegation of legislative power. The syllabus follows:

"A city ordinance makes it unlawful for any driver or operator of any vehicle to permit his or her vehicle to stand in front of a certain railroad passenger station therein named, between points designated, 'unless permission to stand has been granted by the person having the supervision over said passenger station.'

"Held: Such ordinance is invalid because of its attempted delegation of legislative power, and for the reason that it is violative of the equal protection of the law guaranties of the state and federal constitutions."

Also, in 5 Amer. Jur. 58 (p. 551) we find that "the rules governing the delegation of authority apply to delegation by the legislative body of the municipality of power over parking regulations."

And, in People v. Sullivan (1930) 135 Misc. 705, 238 N. Y. Supp. 253, it was said in 72 A. L. R. 232, that "the continuance of the prohibition of parking after the emergency (flood) had ended was held to be beyond the powers of the commissioner since permanent designation of the avenue in question as a parking street was a legislative act which required a direct grant of power to the local authorities, and this power had been given by the legislature to the common council rather than to the commissioner."

Likewise, in the City of Shreveport v. Herndon, 159 La. 113, syllabus 3 is as follows: "Ordinance No. 210 of 1923 of the City of Shreveport, acting under commission from the government provided by Act 302 of 1910, giving commissioner of public safety power to adopt and enforce rules prohibiting parking of vehicles, etc. within areas and, for time limited, to be designated by him within his discretion, held unconstitutional as vesting arbitrary discretion in him, relating to traffic or ordinances, a duty which commission council itself should perform."

Though the case of Hoover v. Blackmore 87 N. E. (2d) 477 is not directly in point, its fifth syllabus informs us that the courts are always mindful of this doctrine of the separation of powers. Here is the said fifth syllabus: "The provision of motor vehicles statute that it shall not prevent local authorities from regulating the stopping of vehicles on streets and highways under their jurisdiction and requiring vehicles to stop before entering or crossing desig-

nated through highways or stop intersections in reasonable exercise of police power, cannot be interpreted as extending county's police power, exercised by county commissioners to include county engineer's discretionary acts, as in erecting stop signs, on ground that such acts best serve public interest."

Likewise, in W. L. Thompson v. Smith, Chief of Police, etc. 71 L. R. A. 604 (155 Va. 367), syllabus 9 provides that: "The legislative branch of the government, whether state or municipal, may not divest itself of its function to declare and determine what the law shall be or delegate it to administrative officials."

And, also in Hagerman, Director of Finance v. City of Dayton, Ohio, et al., 170 A. L. R. 199 (147 Ohio St., 313) in syllabus 11 it was held that: "Municipal civil service employees are to be appraised, and promotions are to be made in individual cases according to merit, fitness, and seniority, and there is no authority for the delegation either by the municipality or the civil service appointees of any functions to any organization of any kind."

Also, in Munson v. City of Colorado Springs, 6 L. R. A. (N. S.) 432 (35 Colo. 506) it was held in Syllabus 3 that: "A city ordinance regulating the licensing of railroad ticket brokers which requires an applicant for license to file with the city clerk a certificate of membership in some reputable ticket broker's association before a license will be issued, is unreasonable and invalid."

Also in St. Louis v. Russell, 20 L. R. A. 721 (116 Mo. 248) it was held in syllabus 2 that: "the power of the city to determine the location of livery stables is a legislative one and it cannot be delegated to the owners of property in a block in which it is intended to erect such structure."

Also, in Curran Bill Posting & Distributing Co. v. Denver, 27 L. R. A. (N. S.) 544, (47 Colo. 221) in syllabus

3, the finding was that: "A municipality cannot commit the exercise of its legislative discretion to private persons, nor to the caprice of its officers, nor reserve to itself, in its administrative capacity, an absolute or despotic power to grant or refuse, in particular cases, without reference to any general and duly elected regulation, a permit to carry on a lawful business."

The following cases also hold that the legislature may not delegate its law making power: Jacksonville v. Ledwith, 9 L. R. A. 69, (26 Fla. 163); Wigal v. Parkersburg, 52 L. R. A. (N. S.) 465, (74 W. Va. 25); Bostock v. Sams, 59 L. R. A. 282 (95 Md. 400); Commonwealth of Massachusetts v. Malatsky, 24 L. R. A. (N. S.) 1168, 203 Mass. 241.

Therefore it is the opinion of the writer that the city ordinance involved in this case is unconstitutional, invalid, and void, for the reason that it violates the rules of the separation of powers and of the prohibition against the delegation of powers by one branch of the government to another. The learned judgments of the commentators in the field of jurisprudence demand an adherence to these rules; the decisions of the courts demand such adherence; the Constitutions of the United States and of the State of Ohio demand such adherence; reason and the natural law demand such adherence.

The judgments in cases T81095 and T81096 should therefore be reversed and judgment entered in this Court in each case for the defendant.

(DULY CERTIFIED)

APPENDIX "B"

Section 508-2, Code of Ordinances of the City of Cincinnati, Ohio.

"The city manager is hereby authorized and required to ascertain on what highways and parts of highways and all other municipal property the accommodation of traffic for the safety of the public requires the restriction as to time, or the prohibition of the parking or stopping of vehicles; and he shall erect and maintain appropriate traffic signs plainly indicating the purport of such restrictions. It shall be unlawful to park or stop a vehicle in violation of a traffic sign so erected."

APPENDIX "C"

THE SUPREME COURT OF THE STATE OF OHIO

ORDER OF MR. CHIEF JUSTICE WEYGANDT

(Entered January 24, 1961.)

On written request of counsel for appellant and for good cause shown, it is ordered that the time for filing certified record in the United States Supreme Court is extended to April 3, 1961.

/s/ CARL V. WEYGANDT,
Chief Justice
The Supreme Court of
Ohio

(DULY CERTIFIED)